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No. 03-525

Supreme Court, U.S.
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In The

Supreme Court of the United States

ANTONIO ROSARIO,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The Seventh Circuit Court Of Appeals

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. Because the "[t]he jury did not determine the quantity of drugs involved," Petitioner Antonio Rosario faced a maximum sentence of 20 years imprisonment on the conspiracy count. Opp. 5-6. The district court, however, sentenced the petitioner 30 years imprisonment on that count. The government concedes that this sentence violated *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Opp. 5-6.

According to the government, the issue boils down to whether the petitioner was "prejudiced," which, in turn, involves analysis of whether the *Apprendi* error had impact on the length of the petitioner's sentence. Opp. 6-7. The government further argues that the prejudice standard is the same under the plain error and harmless error standards of review. Opp. 6 n. 7.

Citing U.S.S.G. § 5G1.2(d), the court of appeals held that the petitioner was not prejudiced because he "could have received the same prison term through stacking the sentences," *i.e.*, sentencing the petitioner "to 20 years on one or more counts with a consecutive 10-year sentence on one or more of the other counts." Pet., App. 36-37.

In its response, the government deviates from the court of appeals' holding by arguing U.S.S.G. § 5G1.2(b) could have allowed the district court to impose a 30-year term on the use of minors drug offenses. Opp. 7. But this was not the basis for the court of appeals' holding. Addressing the government's argument would entail delving into a legal ground that was not considered by the court of appeals. Moreover, U.S.S.G. § 5G1.2(b) does not vitiate the *Apprendi* violation here, as the petitioner was sentenced to

30 years imprisonment on a count that carried a 20 year maximum.

The government asserts that the court of appeals did not err in holding that the "360-month sentence would have been achieved by consecutive sentencing." Opp. 7. In this regard, the government relies on U.S.S.G. § 5G1.2(d), which provides:

> If the sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on one or more of the other counts shall run consecutively, but only to the extent necessary to produce a combined sentence equal to the total punishment.

Reliance on § 5G1.2(d) begs the question. As argued in the *certiorari* petition, statutory law – 18 U.S.C. § 3584(b) – creates a presumption in favor of concurrent sentences and commits the consecutive/concurrent sentencing question to district court discretion. Although not discussed in its response, the government does not appear to dispute the proposition that a statute trumps a guideline provision. *See United States v. LaBonte*, 520 U.S. 751, 757 (1997). In addition, in its statement of the issues, the government avoids the statutory import of the petitioner's claim.

The government also claims that U.S.S.G. § 5G1.2(d) and 18 U.S.C. § 3584(a) do not conflict. That, of course, is an issue presented in this case. In all events, the sentencing guidelines are just one of several factors a district court must consider in determining whether to apply concurrent or consecutive sentences. *See* 18 U.S.C. § 3584(b) (directing district courts to consider factors listed

in 18 U.S.C. § 3553(a)). If the guidelines were wholly controlling, then 18 U.S.C. § 3553(a)'s list of other factors would be superfluous.

The government maintains that there is "no clear conflict in the courts of appeals on whether consecutive sentencing under Sentencing Guidelines § 5G1.2(d) is mandatory or discretionary." Opp. 9. But this is not an instance of a petitioner attempting to conjure a false circuit split. It was the court of appeals in this case that cited the circuit split. Pet., App. 36-37 n. 14. Other courts have discerned circuit conflict. *See, e.g., United States v. Price*, 265 F.3d 1097, 1108-09 (10th Cir. 2001), *cert. denied,* 535 U.S. 1099 (2002). That the majority of the circuits have sided in favor of the mandatory sentencing guideline does not mean those circuits' statutory analysis is correct. *Cf. McNally v. United States,* 483 U.S. 350 (1987).

The government maintains that the circuit split has diminished. Even if that were the case, the conflict between the discretion bestowed by statute, and the lack of discretion under the sentencing guideline, remains. That conflict in itself provides good cause to grant *certiorari*.

More particularly, *United States v. Garcia*, 322 F.3d 842 (5th Cir. 2003), did not purport to overrule *United States v. Vasquez-Zamora*, 253 F.3d 211 (5th Cir. 2001). Citing *United States v. Martinez*, 950 F.2d 222 (5th Cir. 1991), *Garcia* "acknowledged 'the apparent conflict between the seemingly mandatory language of § 5G1.2(d) and the discretion permitted by § 3584." 322 F.3d at 846.

United States v. Velasquez, 304 F.3d 237, 242-43 (3rd Cir. 2002), stated that 18 U.S.C. § 3584 yields district court discretion to impose consecutive or concurrent sentences. The government notes that *United States v.*

Jenkins, 333 F.3d 151 (3rd Cir. 2003), did not set aside a sentence because of an *Apprendi* error because the guidelines would have required consecutive sentences. *Jenkins*, however, was a collateral review case. The court of appeals did not reach the merits since *Apprendi* has not been retroactively applied to collateral review cases. The court of appeals also found the claim to be procedurally barred. Consequently, the court's statements about U.S.S.G. § 5G1.2(d) were *dicta*. Moreover, *Jenkins* did not purport to overrule *Velasquez*.

In any event, *Velasquez* and *Jenkins* have led the government to deduce that Third Circuit law "appears to be unsettled." Opp. 10. Intra-circuit lack of uniformity is another circumstance boding in favor of granting *certiorari*.

Finally, the government urges this Honorable Court to deny *certiorari* on grounds that "[t]he interplay between Section 3584(a) and Guidelines § 5G1.2(d) is essentially a transitional one." Opp. 12. While the cited interplay has arisen in the context of *Apprendi* errors, U.S.S.G. § 5G1.2(d) has the potential to arise in *any* multi-count case. The conflict between the statute and the guideline thus transcends *Apprendi* cases. As neither Congress nor the Sentencing Commission have acted to resolve the conflict, the cited interplay is more than just "transitional."

2. The government attempts to convert the petitioner's second claim into a claim that the evidence at trial was insufficient. The issue raised by the petitioner, however, relates to sentencing, and is significant in light of the 100:1 sentencing disparity between crack and powder cocaine.

The government contends that the petitioner did not support his assertion that the court of appeals applied an incorrect standard of review. Opp. 12. In his *certiorari* petition, however, the petitioner cited the district court's "serious duty to hold the government to" its burden of proving that the substances in question were crack. Pet. 15 (citing *United States v. Holman*, 168 F.3d 655, 658 (3rd Cir. 1999)). Here, the court of appeals rejected the petitioner's argument even though the government failed to respond to the point. In so doing, the government summarily treated the claim and cited no cases. As such, the petitioner has made a showing that the court of appeals did not apply the correct standard of review.

Lastly, the government relies on witness testimony generally referring to crack. However, when the government introduced controlled substances at trial, the substances were referred to as cocaine. *See* Tr. 487, 491, 496, 502, 503, 508, 513, 514, 516, 518, 520-22, 526-29, 586, 594, 598, 607, 608, 629, 630, 634, 641, 757.

* * *

For the reasons stated above and in the petition for writ of *certiorari*, the petition should be granted.

Respectfully submitted,

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